Supreme Court, U.S.
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No. 91-7849

In The

# Supreme Court of the United States

October Term, 1992

STEPHEN BUCKLEY,

*Petitioner,*

vs.

MICHAEL FITZSIMMONS, et al.,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## BRIEF FOR PETITIONER

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## QUESTIONS PRESENTED

1) Whether prosecutors are entitled to absolute prosecutorial immunity for supervision of, and participation in, a year long pre-arrest and pre-indictment investigation because the injury suffered by the criminal defendant occurred during the later criminal proceedings?

2) Whether a prosecutor who makes an out of court public statement in which he falsely asserts that a criminal defendant in a kidnap-murder is guilty and is also a member of a burglary ring, misrepresents evidence in the murder-kidnap case and releases the defendant's mug shot, is protected by absolute prosecutorial immunity against civil liability because some of the injury occurred during the later criminal proceedings?

## LIST OF PARTIES

The parties to the proceeding before the United States Court of Appeals for the Seventh Circuit were the County of DuPage, J. Michael Fitzsimmons, James Ryan, Robert Kilander, Thomas Knight, Patrick King, Edward German, Robert Olsen and the Estate of Louise Robbins.



## TABLE OF CONTENTS


Page

QUESTIONS PRESENTED FOR REVIEW ..... i

LIST OF PARTIES ..... ii

TABLE OF CONTENTS ..... iii

TABLE OF AUTHORITIES ..... v

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED ..... 1

STATEMENT OF THE CASE ..... 3

PROCEEDINGS BELOW ..... 11

SUMMARY OF ARGUMENT ..... 16

ARGUMENT ..... 18

1. RESPONDENTS' SUPERVISION OF, AND PARTICIPATION IN, A YEAR LONG PRE-ARREST AND PRE-INDICTMENT INVESTIGATION, THEIR FABRICATION OF EVIDENCE AND COERCION OF WITNESSES, AND THEIR OUT-OF-COURT PUBLIC STATEMENTS, WHICH CAUSED PETITIONER TO BE FALSELY ARRESTED AND IMPRISONED, ARE NOT ENTITLED TO ABSOLUTE IMMUNITY ..... 18

   A. The was no immunity at common law for a prosecutor's investigatory or administrative acts ..... 20

   B. Policy does not favor absolute immunity here ..... 22

TABLE OF CONTENTS – Continued

Page

C. Respondents' acts are functionally investigative and administrative, rather then prosecutorial, in nature ..... 31

D. The Court of Appeals "place of injury" test for absolute immunity contradicts this Court's decisions that immunity is determined by the function performed ..... 34

2. RESPONDENTS' MALICIOUS DECISION TO SEEK AN INDICTMENT AGAINST PETITIONER IS NOT ENTITLED TO ABSOLUTE IMMUNITY ..... 40

A. Prosecutorial immunity from all liability for malicious prosecution suits was not well established in 1871 ..... 40

B. Public policy does not support absolute immunity for a prosecutor's malicious decision to prosecute based on an improper ulterior motive ..... 45

C. Alternatively, this Court should adopt Justice White's position in *Imbler* and deny absolute immunity for respondents' decisions to prosecute and reprosecute petitioner because those decisions were accompanied by an independent allegation that respondents withheld evidence from the grand jury, the court, and petitioner..... 48

CONCLUSION ..... 49



TABLE OF AUTHORITIES

Page

CASES

*Anderson v. Creighton*, 483 U.S. 635 (1987) ..... 37

*Arnold v. Hubble*, 38 S.W. 1041, 18 Ky Law Rep. 947 (1897) ..... 43

*Barbera v. Smith*, 836 F.2d 96 (2d Cir. 1987)..... 32

*Bradley v. Fisher*, 13 Wall. 335 (1872)..... 21

*Briggs v. Goodwin*, 569 F.2d 10 (D.C. Cir. 1977), cert. den., 98 S. Ct. 3089 (1978)..... 32

*Briscoe v. LaHue*, 460 U.S. 325 (1982) ..... 35

*Burnap v. Marsh*, 13 Ill. 535 (1852)..... 41

*Burns v. Reed*, 500 U.S. ___, 111 S. Ct. 1934 (1991) ..... *passim*

*Burns v. Reed*, 894 F.2d 949 (7th Cir. 1989).....19, 36

*Dean v. Kochendorfer*, 237 N.Y. 384 (1924) ..... 43

*Dennis v. Sparks*, 449 U.S. 24 (1980) ..... 39

*Dinsman v. Wilkes*, 12 How. 390 (1852)..... 41

*Forrester v. White*, 484 U.S. 219 (1987) .....19, 20, 21, 22, 23, 34, 35, 47

*Forsyth v. Kleindeinst*, 599 F.2d 1203 (3rd Cir. 1979) .... 32

*Gobel v. Maricopa County*, 867 F.2d 1201 (9th Cir. 1989).....32, 33

*Griffith v. Slinkard*, 146 Ind. 117 (1896) .....42, 43

*Guerro v. Mulhearn*, 498 F.2d 1249 (1st Cir. 1974)..... 32

*Hampton v. Hanrahan*, 484 F.2d 601 (7th Cir. 1973) .... 32

*Hampton v. Hanrahan*, 600 F.2d 600 (7th Cir. 1979) .13, 29

TABLE OF AUTHORITIES – Continued

Page

*Harlow v. Fitzgerald*, 457 U.S. 800 (1982) .. 17, 18, 22, 38

*Helstoski v. Goldstein*, 552 F.2d 564 (3rd Cir. 1977) .... 33

*Hoar v. Wood*, 44 Mass. 193 (1841) ..... 21

*Imbler v. Pachtman*, 424 U.S. 409 (1975) ..... *passim*

*Jones v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988) .... 30

*Leong Yau v. Carden*, 23 Haw. 362 (1916) ..... 43

*Malley v. Briggs*, 475 U.S. 335 (1985) ..... *passim*

*Marrero v. City of Hialeah*, 625 F.2d 499 (5th Cir. 1980) ..... 33

*Martin v. Merola*, 532 F.2d 193 (2d Cir. 1975) ..... 33

*Marx v. Gumbinner*, 855 F.2d 783 (11th Cir. 1988) .12, 32

*McSurely v. McClellan*, 697 F.2d 309 (D.C. Cir. 1982) .... 32

*Mitchell v. Forsyth*, 472 U.S. 511 (1985) ... 23, 31, 38, 40

*Monell v. Department of Family Services*, 438 U.S. 678 (1978) ..... 27

*Monroe v. Pape*, 365 U.S. 167 (1961) ..... 27

*Owen v. City of Independence*, 445 U.S. 622 (1980) .27, 47

*Palmer v. Chicago*, 562 F. Supp. 1067 (N.D. Ill. 1983) rev'd on other grds. 755 F.2d 560 (7th Cir. 1985) .... 29

*Parker v. Huntington and another*, 2 Gray 124 (Mass. 1854) ..... 41

*Paul v. Davis*, 424 U.S. 693 (1976) .....15, 39

*People v. Wilson*, 116 Ill. 2d 29 (1987) ..... 30

*Pierson v. Ray*, 386 U.S. 547 (1967) ..... 33



TABLE OF AUTHORITIES – Continued

Page

*Powers v. Coe*, 728 F.2d 97 (2d Cir. 1984) ..... 32

*Randall v. Henry*, 5 Stew. and Pot. 367 (Ala. 1834) .25, 41

*Schneider v. Shepherd*, 192 Mich. 82, 158 N.W. 182 (1916) ..... 21

*Schultz v. Thomas*, 832 F.2d 108 (7th Cir. 1987) ..... 25

*Simpson v. Alabama*, 311 So. 2d 307 (Ala. 1975) ..... 29

*Skeffington v. Eylward*, 97 Minn. 244 (1906) ..... 43

*Snyders Case*, 301 Pa. 276 (1980) ..... 29

*State v. Henning*, 33 Ind. 189 (1870) ..... 42

*Stepanian v. Addis*, 699 F.2d 1046 (11th Cir. 1983) .12, 32

*Taylor v. Kavanagh*, 640 F.2d 450 (2d Cir. 1981) ..... 33

*Tenney v. Brandhove*, 341 U.S. 367 (1951) ..... 19

*Tower v. Glover*, 467 U.S. 914 (1983) ..... 19, 22, 37

*Ex parte Virginia*, 100 U.S. 339 (1880) ..... 21

*Walker v. Cahalan*, 542 F.2d 681 (6th Cir. 1976) ..... 33

*White v. Nicholls*, 3 How. 266 (1845) ..... 21

*Wyatt v. Cole*, 112 S. Ct. 1827 (1992) ..... 47

*Yaselli v. Goff*, 12 F.2d 396 (2d Cir.), aff'd, 275 U.S. 503 (1927) ..... 44

STATUTES

18 U.S.C. §241, 242 ..... 28, 29, 30

28 U.S.C. §1254 ..... 1

28 U.S.C. §1292(b) ..... 11

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. §1983 ..... *passim*

Ill. Rev. Stat. Ch. 34 §3-9005 ..... 1, 27

Ind. Const. Art. VII §16 ..... 43

Books

*3 Blackstone Commentaries* ..... 41

Gershman, *Prosecutorial Misconduct* (Clark Boardman, 1992) ..... 28

M. Newell, *Malicious Prosecution* (1892) ..... 41, 43

Law Review Articles

Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 Tex. L. Rev. 629 (1972) ..... 28

F. Harper, *Malicious Prosecution*, 15 Tex. L. Rev. 157 (1937) ..... 41

E. Scalia, *Police Witness Immunity Under §1983*, 56 U. Chi. L. Rev. 1433 ..... 21, 41, 47

Steele, *Unethical Prosecutions and Inadequate Discipline*, 38 Sw. L.J. 965 (1984) ..... 28, 29

Other Authorities

ABA Journal, *A Prosecutor's Duty*, June 1992, at 28 .... 10

Houston Chronicle, May 6, 1992, at 7 ..... 30

Los Angeles Times, *Presumed Guilty*, November 1, 1992, at 18 ..... 10

New York Times, Newman, *How to Protect Other Rodney Kings*, May 1, 1992, at 35 ..... 30

New York Times, May 8, 1992, at 30 ..... 30

## OPINIONS BELOW

The decisions of the United States Court of Appeals for the Seventh Circuit are reported at 952 F.2d 965 (1991) (J.A. 102-110), and 919 F.2d 1230 (1990) (J.A. 66-100). The decision of the United States District Court for the Northern District of Illinois (J.A. 25-61) is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on January 2, 1992. The Petition for Writ of Certiorari was filed on April 1, 1992, and was granted on October 5, 1992. This Court has jurisdiction under 28 U.S.C. §1254(1).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A) 42 U.S.C. §1983.

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

B) Ill. Rev. Stat. Ch. 34 §3-9005

§3-9005. Duties of State's attorney. The duty of each State's attorney shall be:

(1) To commence and prosecute all actions, suits, indictments and prosecutions, civil and criminal, in the

circuit court for his county, in which the people of the State or county may be concerned.

(2) To prosecute all forfeited bonds and recognizances, and all actions and proceedings for the recovery of debts, revenues, moneys, fines, penalties and forfeitures accruing to the State or his county, or to any school district or road district in his county; also, to prosecute all suits in his county against railroad or transportation companies, which may be prosecuted in the name of the People of the State of Illinois.

(3) To commence and prosecute all actions and proceedings brought by any county officer in his official capacity.

(4) To defend all actions and proceedings brought against his county, or against any county or State officer, in his official capacity, within his county.

(5) To attend the examination of all persons brought before any judge on habeas corpus, when the prosecution is in his county.

(6) To attend before judges and prosecute charges of felony or misdemeanor, for which the offender is required to be recognized to appear before the circuit court, when in his power so to do.

(7) To give his opinion, without fee or reward, to any county officer in his county, upon any question or law relating to any criminal or other matter, in which the people or the county may be concerned.

(8) To assist the attorney general whenever it may be necessary, and in cases of appeal from his county to the Supreme Court, to which it is the duty of the attorney general to attend, he shall furnish the attorney general at least 10 days before such is due to be filed, a manuscript of a proposed statement, brief and argument to be



printed and filed on behalf of the people, prepared in accordance with the rules of the Supreme Court. However, if such brief, argument or other document is due to be filed by law or order of court within this 10 day period, then the State's attorney shall furnish such as soon as may be reasonable.

(9) To pay all moneys received by him in trust, without delay, to the officer who by law is entitled to the custody thereof.

(10) To notify, by first class mail, complaining witnesses of the ultimate disposition of the cases arising from an indictment or an information.

(11) To perform such other and further duties as may, from time to time, be enjoined on him by law.

(12) To appear in all proceedings by collectors of taxes against delinquent taxpayers for judgments to sell real estate, and see that all the necessary preliminary steps have been legally taken to make the judgment legal and binding.

## STATEMENT OF THE CASE

This is a damages action brought pursuant to 42 U.S.C. §1983 and state law by petitioner Buckley. Petitioner's amended complaint alleged that respondent DuPage County State's Attorney Fitzsimmons, his successor, respondent James Ryan, respondent assistant state's attorneys Knight, King, and Kilander, Sheriff Doria of DuPage County, several deputy sheriffs, and several forensic personnel, individually and in conspiracy, fabricated evidence against him and wrongfully arrested, imprisoned and prosecuted him for a murder and rape that they knew he did not commit, and also engaged in a media campaign designed to destroy petitioner's right to

fair hearings and trial and to publicly defame him. As a result of defendants' wrongdoing, petitioner was wrongfully arrested, and imprisoned for three years. J.A. 3-24.

On February 25, 1983, 11 year old Jeanine Nicarico was abducted from her home in Naperville, DuPage County, Illinois. Several days later her body was discovered; she had been sexually molested and murdered. J.A. 6, ¶ 19. An intensive investigation into the crime was jointly undertaken by the DuPage County State's Attorney's Office and the DuPage County Sheriff's Department. This investigation was under the joint direction and responsibility of respondent Fitzsimmons and Sheriff Doria; respondents Knight and King were involved with the sheriff's police in all the early stages of the investigation. J.A. 6-10, ¶ 20, 25, 28, 30, 32.

The crime engendered extensive publicity and aroused intense emotions among the populace of DuPage County, and this created great public pressure on respondents to find someone to charge. J.A. 7, ¶ 21. After a mentally disturbed and totally incredible person, Alex Hernandez, said petitioner was present at a post-murder conversation where someone else talked about the murder, respondents and other investigators worked together for several months to fabricate evidence against petitioner, Hernandez, and Rolando Cruz. J.A. 7, 10, 12, ¶ 22, 35, 42, 43.

The most significant piece of evidence respondents concocted involved a bootprint found on the Nicarico's door. After investigators interrogated petitioner, he voluntarily gave them his boots so that they could compare them with the bootprint. J.A. 7, ¶ 23. The sergeant in charge of the identification section of the DuPage County Crime Laboratory determined that the boots did not



match the print, the head of the crime laboratory confirmed this, and respondents were informed of this conclusion. J.A. 8, ¶ 25. When Sheriff Doria was informed of the non-match, he confiscated the boots before the sergeant could complete his tests and report, and sent them to Edward German of the Illinois Department of Law Enforcement Crime Laboratory, in an attempt to get an opinion that the boot and print did match. J.A. 8, ¶ 26, 27. Although German initially wrote in his notes that the boot "could have at best" made the print on the door, and that "another shoe could very well have made the print," respondent Knight persuaded him to change his opinion to falsely link petitioner's boots and the print. J.A. 8, 14, ¶ 27, 53, 55.

Respondents generated further false bootprint evidence against petitioner from Robert Olsen and Louise Robbins. J.A. 8, ¶ 28. Olsen, who worked at the Kansas Crime Laboratory, initially concluded that "the paucity of sufficient similar individual characteristics (between the boot and the print) precluded a positive identification." J.A. 8-9, ¶ 29. Subsequently, respondents induced him to change his conclusions so as to falsely implicate petitioner. J.A. 14, ¶ 53. Even though the boot and print did not in fact match at all, respondent Knight finally procured the "positive identification" he and the others had been searching for from Louise Robbins, an anthropologist whose theories and reputation were well known to be discredited.[1] J.A. 9, 14, ¶ 31, 53.

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[1] Among Robbins' wild claims was her assertion that she could identify the wearer of a shoe with certainty even if she had only prints made with different shoes. J.A. 70.

Next, respondents Knight and King induced Hernandez to make false statements inculpating petitioner by offering him reward money (J.A. 11, ¶ 39), and respondent Knight paid money to Cruz in return for him falsely inculpating petitioner. J.A. 11, ¶ 40. Respondents were aware that both statements were false. J.A. 11, ¶ 39, 40.

Respondents Knight and King and other investigators repeatedly interrogated petitioner, using intimidation and intense pressure, but petitioner steadfastly maintained his innocence and demonstrated no knowledge of the crime. J.A. 9-10, ¶ 32. Although an experienced detective working on the case told Knight, King, and Doria that petitioner was not involved in the crime (J.A. 10, ¶ 33, 34), Knight, King, and Fitzsimmons continued their efforts to create false evidence against petitioner by calling him before a special investigative grand jury impaneled solely for the purpose of investigating the Nicarico case, and intimidating him during his interrogation. J.A. 9-10, ¶ 32, 35, 36. They also misrepresented the bootprint evidence to the grand jury and withheld those portions of that evidence which were unfavorable to them, introduced the false statements of Hernandez and Cruz, and presented much incredible, irrelevant, false, and contradictory hearsay and double hearsay evidence in order to prejudice petitioner. J.A. 10-11, ¶ 37-39.

Despite this abuse of the grand jury, respondent Fitzsimmons publicly admitted on January 27, 1984, that he had insufficient evidence to indict or prosecute. J.A. 11, ¶ 41. Then, on March 9, 1984, only a few days before a hotly contested primary election for State's Attorney, Fitzsimmons, Knight, and King obtained grand jury indictments against petitioner, Hernandez and Cruz, despite the fact that no new evidence of significance had



been presented since respondent Fitzsimmons' admission of January 27th. J.A. 12, ¶ 42, 46. There was no probable cause for these indictments, which were obtained in order to aid Fitzsimmons' re-election campaign, to diffuse public pressure, to cover up respondents' inability to solve the crime, and to coerce petitioner and his co-indictees to reveal information about the crime and/or to falsely inculpate themselves or each other. J.A. 12, ¶ 43. All three were arrested and imprisoned at the direction of respondent Knight and Sheriff Doria, unable to make their $3,000,000 bond. J.A. 12-13, ¶ 42, 46.

In order to reap political benefits from this extremely high profile case, Fitzsimmons appeared at a press conference that same day. J.A. 12, ¶ 44. Knowing that his statements would violate petitioner's right to a fair trial and defame him, and aware of the pre-existing public emotion and prejudice against anyone connected with the crime, Fitzsimmons nonetheless referred to prior criminal conduct alleged against petitioner and falsely claimed that he was part of a burglary ring, asserted that petitioner was guilty of the Nicarico murder, misrepresented evidence, including the bootprint evidence, and released mug shots of petitioner to the media. J.A. 12, 19, ¶ 44, 78.

After the indictment, respondents continued to attempt to create false evidence. Investigators, including respondents Knight and King, attempted to obtain false admissions and false testimony from petitioner, Hernandez and Cruz by threatening the death penalty if they did not cooperate. J.A. 12-13, ¶ 46. Persons within the Sheriff's Department who objected to the false arrest and prosecution were given unfavorable assignments and forced to resign (J.A. 13, ¶ 49); and Knight and King suppressed the favorable bootprint evidence which was

only discovered by petitioner's counsel through independent investigation on the eve of trial. J.A. 13, ¶ 50.

In November, 1984, respondent Ryan replaced Fitzsimmons as State's Attorney. He appointed Knight, who had left the office, as the Special State's Attorney for the Nicarico prosecution, and approved and authorized the continued imprisonment and prosecution of petitioner and his co-indictees. J.A. 14, ¶ 52. Knight continued to work with investigators and witnesses to further construct and shape the bootprint evidence so as to falsely implicate petitioner. J.A. 14, ¶ 53. In January, 1985, the case came to trial in an atmosphere poisoned by prejudice against petitioner, caused in part by public statements made, or prompted, by respondents, including Fitzsimmons. J.A. 14, ¶ 54. At trial, respondents Knight and King presented the bootprint evidence of German, Olsen and Robbins which they had previously fabricated, and the false statements of Hernandez and Cruz. J.A. 14-15, ¶ 55, 56. Despite this concerted effort by respondents to falsely convict him through prejudice and false evidence, the jury was hung as to petitioner and a mistrial was declared. J.A. 15, ¶ 57.

Respondents continued to falsely imprison and accuse petitioner. J.A. 15, ¶ 58. They publicly announced they would retry petitioner, while Fitzsimmons, who was no longer the State's Attorney but who continued to participate in the wrongful imprisonment of petitioner, made public statements to the media in which he again falsely claimed petitioner was guilty of raping and killing Jeanine Nicarico. J.A. 15, ¶ 58, 59. In addition, the prosecutors, including Knight, continued to fan the flames of prejudice by encouraging and prompting the Nicarico



family and friends to make inflammatory statements that petitioner was guilty of the crime. J.A. 15, ¶ 59.

Petitioner remained imprisoned pending the proposed re-trial, still held on the $3,000,000 bond, which was set so high because of the emotions and prejudice engendered by the public statements of respondents. J.A. 12-13, 15, ¶ 45, 46, 58. In June, 1985, respondents Knight, Kilander and Ryan were informed that an admitted serial child murderer, Brian Dugan, had confessed that he alone raped and murdered Jeanine Nicarico. J.A. 15-16, ¶ 60-62. Despite this admission, which was corroborated both by Dugan's recitation of details that would be known only to the murderer and by his successfully passing a polygraph test, respondents Ryan, Knight, and Kilander continued to wrongfully imprison petitioner, and Knight made false and misleading statements to the media attempting to discredit Dugan's confession, in order to maintain and increase public prejudice against petitioner, and to thereby justify his continued imprisonment. J.A. 16-17, ¶ 62, 64, 65.

Respondents opposed petitioner's attempt to lower his bond, even in the face of a report from a highly respected FBI bootprint expert demonstrating that petitioner's boot did not make the bootprint on the door. J.A. 17, ¶ 66. Aware that the manufactured case against petitioner was crumbling, and that petitioner would have to be released unless more evidence was fabricated, respondent Kilander interrogated a prisoner for the purpose of investigating an alleged inculpatory statement made by petitioner. J.A. 17, ¶ 67. Kilander subsequently claimed he had obtained such a statement, but this claim was a fabrication by Kilander. J.A. 17, ¶ 68. Nevertheless, this purported statement caused the further postponement of

petitioner's retrial, and thus his continued imprisonment. J.A. 17, ¶ 68. Petitioner remained imprisoned until March, 1987, when respondents Ryan, Knight, Kilander and King used Louise Robbins' death as a pretext to dismiss the charges against him, while refusing to publicly acknowledge that petitioner was innocent of the Nicarico murder and that they had arrested and imprisoned the wrong man. J.A. 18, ¶ 72.

The Dugan confession led to an Illinois State Police investigation which convinced both the police commander assigned to the case and the Director of the Illinois State Police that Dugan had acted alone in raping and killing Jeanine Nicarico. *Presumed Guilty*, L.A. Times, Nov. 1, 1992, at 18, 22-25. The Police Chief of Naperville, where the crime took place, concurred that respondents had charged, arrested and prosecuted the wrong men, and was thrown out of respondents' office for telling them so. *Id.* at 25. Nonetheless, after the Illinois Supreme Court reversed Cruz and Hernandez' convictions, respondents retried these men. Cruz was again convicted and again sentenced to death. *Id.* at 25, 58-59. The jury hung at Hernandez' second trial. He was tried a third time and convicted, but the judge, unconvinced of his guilt, refused to give him the death penalty, and his conviction is currently on appeal. *Id.* at 59. On Cruz' second appeal the prosecution was represented by the Illinois Attorney General's office. *See, A Prosecutor's Duty*, ABA Journal, June 1992, at 28-9. In March, 1992, the Assistant Attorney General assigned to defend the Cruz conviction on appeal resigned, saying that, after reading the record, she "had no doubt" that Dugan committed the crime alone, and called on the Attorney General to confess error. *Id.* at 28. The Attorney General, however,



refused to do so, and is now defending the conviction before the Illinois Supreme Court. *Id.* at 28.

## PROCEEDINGS BELOW

The district court dismissed all claims against the prosecutors and forensic personnel, except for the claim against Fitzsimmons for his public statements at the pretrial press conference, on the basis of absolute prosecutorial immunity, and entered a Rule 54(b) judgment.[2] J.A. 25-65. Fitzsimmons appealed, as of right, the portion of the decision which denied him absolute immunity, and petitioner appealed the dismissal of the remaining claims.

The court of appeals refused to review petitioner's appeal as to respondent Fitzsimmons because a "factually related" claim against Fitzsimmons remained undismissed at the time of the appeal. J.A. 75-82.[3] On the merits, the court of appeals declined to wait for this Court's then imminent decision in *Burns v. Reed*, 500 U.S. ___, 111 S. Ct. 1934 (1991), but instead forged ahead to further expand prosecutorial immunity. The court characterized petitioner's allegations against respondent prosecutors as "coercive interrogations in 1983 and 1984 by police and prosecutors, arm-twisting of experts which led them to 'find' similarities between his shoes and the bootprint, misleading presentations to the grand jury,

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[2] The court also upheld petitioner's *Monell* claims as to the Sheriff but not as to the State's Attorney, holding that the Sheriff was a county official, while the State's Attorney was a state official.

[3] For the same reason, the court refused to review the dismissal of the *Monell* claim based upon the actions of the State's Attorney. The court rejected as tardy the district court's later certification of these issues under 28 U.S.C. §1292(b).

indictment, and stubborn refusal to dismiss the case despite Dugan's confession." J.A. 74. It acknowledged that "immunity is absolute only when the prosecutor performs distinctly prosecutorial functions" and that immunity "follows the act, rather than the actor" (J.A. 84), but then held that the determinative factor was not the nature of the act standing alone, but rather the circumstances and locus of the injury occasioned by the act: "If the injury flows from the initiation or prosecution of the case then the prosecutor is immune . . . (but) (i)f . . . a constitutional wrong is complete before the case begins, then the prosecutor should be treated as a police detective would be in like circumstances: qualified rather than absolute immunity." J.A. 87-8. Purporting to apply this principle, the court extended absolute immunity to respondents for their involvement in "the entire investigation of (the) case, meetings with witnesses, presentation to (the) grand jury, and formulation of (the) decision to prosecute." J.A. 92.[4]

The court further held that since Fitzsimmons' statements at the pretrial press conference were alleged to have caused injury during the criminal process – they prejudiced the jury so that an acquittal was not obtained, and the Judge so that he would not reduce petitioner's bond even after the jury hung and Dugan confessed – absolute immunity applied again. J.A. 88-92.[5] The court

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[4] The court also held that absolute immunity did not apply to respondents' interrogation of Buckley if the injury occasioned by the interrogation was complete before the judicial process was initiated. J.A. 93-95.

[5] The court acknowledged that this holding was contrary to *Stepanian v. Addis*, 699 F.2d 1046 (11th Cir. 1983), and *Marx v. Gumbinner*, 855 F.2d 783 (11th Cir. 1988), and in apparent conflict



also affirmed the district court's award of absolute immunity to the forensic personnel for their pre-trial activities. J.A. 95-97.

Judge Fairchild dissented on the issue of Fitzsimmons' public statements, stating:

> It is true that procedures afforded in our system of justice give a defendant a good chance to avoid such results of prejudicial publicity as excessive bail, difficulty or inability of selecting an impartial jury, and the like. These procedures reduce the cost of impropriety by a prosecutor, but I do not find that the courts have recognized their availability as a sufficient reason for conferring immunity.
>
> Prejudicial pretrial publicity may make it more difficult and more expensive for a defendant to protect the fairness of his trial, and I would recognize that as a constitutional wrong for which damages can be obtained where the prosecutor has acted wrongfully at a stage, such as a press conference, where the purposes to be served by immunity do not apply.

J.A. 99-100.

In March, 1991, petitioner filed his first Petition for Certiorari, raising the following questions for review:

> 1. Whether a prosecutor who makes an out of court public statement in which he falsely asserts that a criminal defendant in a kidnap-murder is guilty and is also a member of a burglary ring, misrepresents evidence in the murder-kidnap case and releases the defendant's mug shot, is protected by absolute prosecutorial immunity against civil liability?

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with its prior decision in *Hampton v. Hanrahan*, 600 F.2d 600 (7th Cir. 1979), and therefore circulated its opinion to the entire court. Two judges voted to rehear the issue *en banc*, while two others recused themselves. J.A. 91-2.

> 2. Whether prosecutors are entitled to absolute prosecutorial immunity for supervision of and participation in a year long pre-arrest and pre-indictment investigation because the injury suffered by the criminal defendant occurred during the later criminal proceedings?
>
> 3. Whether experts who conspire with prosecutors to manufacture false evidence which inculpates the plaintiff, and who write out of court reports and render out of court opinions in furtherance of this conspiracy, are entitled to absolute immunity as witnesses because the most inculpatory of those reports and opinions are later presented in testimony to a grand jury and at a criminal trial?

*Buckley v. Fitzsimmons*, 90-7574, Petition at p. i.

On October 7, 1991, this Court entered the following order:

> The motion for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Seventh Circuit for further consideration in light of *Burns v. Reed*, 500 U.S. ___ (1991).

112 S. Ct. 40 (1991), J.A. 101.

On remand, a majority of the original court of appeals' panel concluded that *Buckley* "is not directly governed by *Burns*," that "*Burns* reinforces *Buckley*'s approach," and reentered its original judgment. J.A. 102-9. With regard to the prosecutors' "supervision of and participation in a year long pre-arrest and pre-indictment investigation," and their "preparation for trial" by procuring the bootprint evidence, the majority stated:

> We therefore reiterate the conclusion of our initial decision: unless the act of gathering and evaluating the evidence independently violates someone's rights (as, for example, by seizing persons or things in violation of the fourth amendment), both witnesses and prosecutors are entitled to the same immunity they possess when they present the evidence in court.



J.A. 105.

Then, after stating that "*Burns* bears more strongly on Buckley's claim arising out of the press conference," because, "like the advice to the police in *Burns*, the press conference took place out of court, and was not part of preparation for trial," the majority again granted the prosecutor absolute immunity for this non-prosecutorial act because the injury "depend[ed] on the judicial decision." J.A. 105-8. Curiously, the court did carve out a narrow exception where a prosecutor "actually arrested" a plaintiff, and remanded on this issue to "examine whether the persons who arrested the plaintiff lacked probable cause." J.A. 109.[6] Judge Fairchild broadened his dissent to include the prosecutors' investigative acts, stating:

> Plaintiff claims, however, that Mr. Fitzsimmons played a very aggressive role in seeking favorable expert evidence linking the incriminating boot print to plaintiff, and in "supervision of and participation in a year long pre-arrest and pre-indictment investigation." I am unable to conclude as a matter of law that this alleged conduct falls on the side of the line to which the *Burns* Court ascribed absolute immunity.

J.A. 110.

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[6] Additionally the court declined to consider petitioner's *Paul v. Davis*, 424 U.S. 693 (1976), argument on the prosecutorial publicity question, because petitioner purportedly did not preserve it in his original certiorari petition. J.A. 105-6.

## SUMMARY OF ARGUMENT

Since the express language of 42 U.S.C. §1983 admits of no immunities, the grant of absolute prosecutorial immunity, like other absolute immunities, is the exception rather than the rule, and should be granted only if the particular function at issue was immunized at common law at the time the statute was enacted *and* overriding considerations of public policy justify such immunity.

Petitioner has alleged that respondent-prosecutors supervised and participated in a year long pre-arrest and pre-indictment investigation which included the manufacture of evidence and the coercion of witnesses; conducted a prejudicial and defamatory publicity campaign which included a press conference held when petitioner was charged; ordered petitioner's arrest and imprisonment and continued that arrest and imprisonment after the jury hung and an admitted child killer admitted he committed the crime; and thereafter attempted to manufacture additional evidence. These acts are more normally performed by police investigators and police officers, are remote in time and place from the judicial process, and are essentially investigative rather than prosecutorial. Similarly, the public statements are clearly administrative rather than prosecutorial, as they are in no way necessary to, or connected with, the judicial process, and can as easily be performed by non-prosecutorial personnel. This allocation of respondents' acts is fully supported by this Court's recent decision in *Burns v. Reed*, 111 S. Ct. 1934 (1991), and is consistent with the rationale previously set forth in *Imbler v. Pachtman*, 424 U.S. 409 (1975).

In *Imbler*, this Court relied upon common law and public policy considerations in granting a prosecutor absolute immunity for conduct intimately associated with



the judicial process. At common law, investigative and administrative acts, such as those alleged by petitioner, were not afforded absolute immunity. Furthermore, policy considerations in favor of immunity for such acts are far from "overriding" while the need for compensation and deterrence militates decisively against absolute immunity. The alternative methods of deterrence relied upon by *Imbler* – criminal prosecution, professional discipline, and corrective judicial action within criminal proceedings – have all been shown to be woefully inadequate. Moreover, this Court's intervening decision in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), has, by removing the subjective prong of the qualified immunity test, eliminated a major policy concern of the *Imbler* Court, since qualified immunity now provides a prosecutor adequate protection from unmeritorious suits. Additionally, the public policy considerations which support the protection of a prosecutor's prosecutorial functions are not applicable to investigative and administrative acts such as those alleged against respondents.

The majority below created, from whole cloth, an injury test which circumvents the principles enunciated in *Imbler* and the holding in *Burns*. This injury test – that respondent is entitled to absolute immunity if his injury "flows from" the judicial process, or if petitioner's injury is incomplete at the time the judicial process is initiated – is a novel and radical extension of absolute immunity, completely unsupported by the common law, and in direct contradiction to the policy considerations discussed above. Moreover, it is unworkable, as is graphically demonstrated when the test is applied to the facts in *Burns*, or the facts here.

Additionally, petitioner has alleged that respondents' decision to prosecute and reprosecute was malicious and without probable cause. While the *Imbler* decision can be read to grant absolute immunity for such decisions, petitioner urges this Court to limit *Imbler* to those prosecutorial acts which take place in court. A close examination of the common law in 1871 establishes that prosecutors were entitled only to qualified immunity for their decisions to maliciously prosecute. Furthermore, the intervening decision in *Harlow*, the ineffectiveness of existing forms of deterrence, and the fact that such prosecutorial decisions do not directly implicate judicial proceedings, support a modification of *Imbler* which would afford prosecutors only qualified immunity for such decisions. Alternatively, if this Court declines to make this general modification, petitioner urges that it apply the rationale of Justice White's concurrence in *Imbler*, and hold that prosecutors are not entitled to absolute immunity for their prosecutorial decisions when there is an independent allegation that they withheld crucial exculpatory evidence from the grand jury, the court, or the defense.

## ARGUMENT

### 1. RESPONDENTS' SUPERVISION OF, AND PARTICIPATION IN, A YEAR LONG PRE-ARREST AND PRE-INDICTMENT INVESTIGATION, THEIR FABRICATION OF EVIDENCE AND COERCION OF WITNESSES, AND THEIR OUT-OF-COURT PUBLIC STATEMENTS, WHICH CAUSED PETITIONER TO BE FALSELY ARRESTED AND IMPRISONED, ARE NOT ENTITLED TO ABSOLUTE IMMUNITY.

42 U.S.C. §1983 makes liable every person who, while acting under color of state law, deprives another of his



constitutional rights. The statute itself contains no limitation on the class of persons or type of conduct subject to liability, but this Court has previously held that the statute must be read against the background of immunities and defenses in effect at the time of its enactment in 1871. *Tenney v. Brandhove*, 341 U.S. 367 (1951); *Imbler v. Pachtman*, 424 U.S. 409 (1975). Only if such immunities or defenses for the particular function at issue were recognized at common law, and, in addition, only if absolute immunity "is justified by overriding considerations of public policy," *Forrester v. White*, 484 U.S. 219, 224 (1987), have respondents met their burden of establishing absolute immunity. To be recognized as an exemption from §1983 liability, absolute immunity must be "so firmly rooted in the common law and supported by such strong policy reasons that the Court has been unwilling to infer that Congress meant to abolish (it) in enacting 42 U.S.C. §1983." *Imbler v. Pachtman*, 424 U.S. at 434 (White, J., concurring in judgment).

The existence at common law of the particular immunity in question is a precondition to the recognition of such immunity under §1983. *Tower v. Glover*, 467 U.S. 914, 922-23 (1983); *Malley v. Briggs*, 475 U.S. 335, 339-40 (1985); *Burns v. Reed*, 111 S. Ct. 1934, 1945-46 (1991) (Scalia, J., concurring in part and dissenting in part). Courts "do not have a license to establish immunities from §1983 in the interests of what we judge to be sound public policy." *Tower v. Glover*, 467 U.S. at 922-23. "(O)ur role is to interpret the intent of Congress in enacting §1983, not to make a freewheeling policy choice, and we are guided in interpreting Congress' intent by the common-law tradition." *Malley v. Briggs*, 475 U.S. at 342. Because there was no common law immunity for prosecutors who engaged in

investigative or administrative acts, including fabrication of evidence and out-of-court defamatory statements which prejudiced a fair trial, and, further, because public policy does not support absolute immunity for such acts, immunity should be denied here.

### A. There was no immunity at common law for a prosecutor's investigatory or administrative acts.

Neither the Seventh Circuit nor respondents have identified any authority establishing that investigative or administrative acts by a prosecutor, including the fabrication of evidence and the making of out-of-court defamatory statements, were entitled to absolute immunity at common law. In the absence of such authority, respondents' request for absolute immunity must be denied.

In determining absolute immunity, it is the function performed by the official, not the status of the official *per se*, that is determinative, and thus the Court "examine(s) the nature of the functions with which a particular official or class of officials has been lawfully entrusted." *Forrester v. White*, 484 U.S. at 224. "(T)he official seeking absolute immunity bears the burden of showing that such immunity is justified for the *function* in question." *Burns v. Reed*, 111 S. Ct. 1934, 1939 (emphasis added). Respondents' status as prosecutors thus affords them no special dispensation to violate petitioner's constitutional rights and remain free from damages liability. It is only if the contested function was entitled to absolute immunity under common law in 1871 that such immunity should be recognized now.

Absolute immunity at common law was "exceedingly rare." *Burns v. Reed*, at 1947 (Scalia, J., concurring and



dissenting). It extended to judges for their judicial, but not administrative, acts, *Forrester v. White*, 484 U.S. 219, 227-28 (1987); *Bradley v. Fisher*, 13 Wall. 335 (1872); *Ex parte Virginia*, 100 U.S. 339 (1880); *Burns v. Reed*, at 1946 (Scalia, J., concurring and dissenting); and to participants in the judicial process to protect them from defamation liability for "anything said or written in the course of any judicial proceeding." E. Scalia, *Police Witness Immunity Under §1983*, 56 U. Chi. L. Rev. 1433, 1434 (1989). For lawyers this immunity covered "any courtroom statement relevant to the subject matter of the proceeding . . . (and) extend(ed) to their briefs and pleadings as well." *Imbler v. Pachtman*, 424 U.S. at 426 n. 23; *see also, Hoar v. Wood*, 44 Mass. 193 (1841); *White v. Nicholls*, 3 How. 266, 287 (1845).

This Court has concluded that prosecutors were immune at common law from malicious prosecution suits (but see post at 40-48), but has noted that absolute immunity did not protect a prosecutor from liability for false arrest. *Imbler v. Pachtman*, at 441 n. 6 (White, J., concurring in judgment) (citing 1 Harper & James, *The Law of Torts* §3:17 and 3:18 (1956), and *Schneider v. Shepherd*, 192 Mich. 82, 158 N.W. 182 (1916) [prosecutor liable for his conduct in directing an investigation that led to the arrest of the plaintiff]). There is no pre-1871 authority granting immunity to public prosecutors for anything other than their activities before a judicial tribunal or, possibly, the bringing of a criminal proceeding, and no authority granting immunity for the fabrication of testimony or out-of-court statements. Thus, at common law respondents would not have been entitled to absolute immunity for the acts alleged against them here, because such conduct did not fit within the small category of acts which were cloaked with absolute immunity.

**B. Policy does not favor absolute immunity here.**

In addition to its lack of historical basis in the common law, the absolute immunity sought by respondents here is not warranted by policy. Even if an immunity were recognized at common law, it should not be incorporated into §1983 if "§1983's history or purpose nonetheless counsel against recognizing the same immunity in §1983 actions." *Tower v. Glover,* 467 U.S. at 920. "(W)hile we look to the common law for guidance, we do not assume that Congress intended to incorporate every common law immunity into §1983 in unaltered form." *Malley v. Briggs,* 475 U.S. 335, 340 (1985). Absolute immunity should apply in §1983 actions only if the "officials who seek exemption from personal liability (meet) the(ir) burden of showing that such an exemption is justified by overriding considerations of public policy." *Forrester v. White,* 484 U.S. at 224. Because respondents have failed to demonstrate that public policy justifies absolute immunity for a press conference, fabrication of evidence, and other related investigative or administrative acts, such immunity should be denied here.

As was stated in *Burns,* this Court "completely reformulated qualified immunity" in *Harlow v. Fitzgerald,* 457 U.S. 800 (1982),

> replacing the common-law subjective standard with an objective standard that allows liability only where the official violates clearly established statutory or constitutional rights of which a reasonable person would have known.

*Burns,* at 1944 n. 8. This radical change was designed to "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary



judgment." *Id.,* quoting *Malley v. Briggs,* at 341. This standard, enunciated after *Imbler,* "satisfies one of the principal concerns underlying our recognition of absolute immunity (in *Imbler*)," *Burns* at 1944 n. 8, referring to *Imbler,* 424 U.S. at 419 n. 13. This concern, as defined in *Imbler,* was that the subjective motivation and intent component of qualified immunity could not normally be resolved until after the evidence was presented at trial, and its removal by this Court's decision in *Harlow* militates strongly against unnecessarily extending the scope of the traditional concept of absolute immunity. *See, Forrester v. White,* at 224. Also, since *Imbler,* government officials have been afforded the right to immediately appeal the denial of qualified immunity, *Mitchell v. Forsyth,* 472 U.S. 511 (1985). The public policy concerns articulated in *Imbler* in support of absolute prosecutorial immunity must therefore also be reformulated in light of the extremely protective qualified immunity to which respondents are now entitled.

*Imbler* articulated several policy concerns in favor of granting absolute immunity to prosecutors for actions intimately associated with the judicial process. The Court was concerned that litigation concerning the prosecutor's initiation and conduct of a criminal proceeding would constrain the prosecutor's decision making in that area and affect his conduct of prosecutions, and saw this as conflicting with the public's interest in a prosecutor having wide discretion in how he tries his case, and in allowing a jury to decide between conflicting evidence. *Imbler* at 424, 426 and 430; *Burns* at 1943. Further, it feared that civil proceedings would lead to relitigation of the entire criminal case and, in effect, impose additional review on top of that already afforded by criminal

appeals and post conviction proceedings (*Imbler* at 425), and suggested that denial of absolute immunity might lead trial and appellate judges to ignore meritorious objections by defendants to the fairness of a trial, since recognition of such errors would lead to a prosecutor being liable for damages. *Id.* at 427.

None of these policy considerations warrant absolute immunity for respondents' involvement in the pre-arrest investigation, fabrication of evidence, interrogation of witnesses, arrest and imprisonment of petitioner, or their out-of-court statements. Here, the creation of false evidence began nearly a year before petitioner was indicted, let alone tried, and apparently before any firm decision to prosecute petitioner had been made. Moreover, petitioner's challenge to the false evidence related primarily to the manufacture of the evidence, not its use against him in the criminal trial. Thus, litigation of this claim would not question or impinge upon the prosecutors' decision to prosecute petitioner or introduce the evidence before the grand jury or at trial, but rather respondents' role at an earlier period of time when they were acting as, and with, police investigators.

If the investigating prosecutors and the prosecuting prosecutors were different people, then the distinction in functions would appear brighter, but the legal ramifications would be conceptually identical. In that circumstance, the prosecuting prosecutors might well be immune, under *Imbler*, for their role in initiating and conducting the prosecution because litigation might invade the sphere of trial strategy. But litigation against the investigating prosecutors would have no such effect. The wrongdoing of those prosecutors was complete prior to the prosecution, and the fact that a major part of the



injury was sustained through use of the manufactured evidence by another has never been held to protect the investigator from liability. *See, e.g., Malley v. Briggs*, at 340-41; *Randall v. Henry*, 5 Stew. and Pott. 367, 377 (Ala. 1834). Under this Court's functional analysis it is irrelevant that the investigating prosecutor and the prosecuting prosecutor were the same, since it is the duties being performed, not the personalities involved, which determines whether the act is immunized.

> Moreover, *Imbler's* concern about vexatious litigation, is not merely a generalized concern with interference with an official's duties, but rather is a concern with interference with the conduct closely related to the judicial process . . . . Absolute immunity is designed to free the *judicial process* from the harassment and intimidation associated with litigation . . . . That concern therefore justifies absolute prosecutorial immunity only for actions that are connected with the prosecutor's role in judicial proceedings, not for every litigation inducing conduct.

*Burns*, at 1943 (citations omitted, emphasis in original). Here, the litigation on this claim would concentrate on respondents' role in the investigation, not their subsequent prosecution of petitioner in court, and such litigation would not "harass or intimidate" the judicial process. Neither would litigation on this claim constitute relitigation of the criminal trial since the contested issues occurred well before the trial was underway.

Moreover, *Imbler's* concern that a criminal court judge would be loath to recognize a prosecutor's errors for fear of opening him to damages liability is not a strong argument. A judge's determination in the criminal proceeding would not necessarily be admissible in a subsequent civil suit, *see, Schultz v. Thomas*, 832 F.2d 108 (7th

Cir. 1987), and recognition of prosecutorial error by a criminal court would in no way ensure a victory by a civil plaintiff. In addition, judges' decisions routinely have extensive impact on officials' liabilities but judges are expected to objectively apply the relevant law without fear of the consequences.

*Imbler* also suggested that absolute immunity was warranted because there are several checks other than civil litigation to prevent prosecutorial abuses. But as *Burns* noted, the type of conduct challenged here – out of court activities by a prosecutor, some of which were prior to the initiation of the prosecution – will not necessarily be restrained by the judicial process, especially if petitioner is not taken to trial. Yet if immunity depends on the functions being performed it cannot be controlled by the fortuity of prosecution, since that would replace the "functions" test by a standard which looked to future events. Moreover, such a test would encourage unwarranted prosecutions since a prosecutor who had engaged in wrongdoing could avoid all civil liability by causing the victim to be criminally prosecuted.

Since the conduct challenged here did not occur before a judge or any judicial body, it was unlikely to be subject to judicial controls. By the time the evidence could be tested before a trier of fact, petitioner had already suffered imprisonment for almost a year. Moreover, the detention of petitioner for over two years *after* his first trial was never litigated in the criminal proceeding. Petitioner remained incarcerated while respondents' manufactured case crumbled around them, with the FBI confirming that his boots did not match the print on the door and an admitted child murderer confessing to the crime and asserting petitioner had nothing to do with it.



Respondents refused to voluntarily dismiss the charges or support petitioner's release on affordable bail, but when forced to retrial, they finally conceded that they had no case by dropping all charges against petitioner.

Respondents' defamation of petitioner, and their attempts to deny him fair hearings and trial, are likewise disconnected from the judicial phase of the criminal process and thus are not entitled to absolute immunity. Litigation on this issue would not concentrate on respondents' trial strategy or their initiation of the prosecution, and thus would not affect the prosecutor's role in judicial proceedings. Moreover, holding press conferences, making public statements, and attempting to fan the flames of community prejudice against petitioner are not a part of respondents' statutory duties, nor are they functions necessary to ensure that crimes are vigorously prosecuted. *See*, Ill. Rev. Stat. Ch. 34 §3-9005. Prosecutors have no special powers or expertise with regard to out-of-court statements, and such functions could, if thought necessary to inform the populace of a criminal indictment, be undertaken by a press spokesperson or other non-prosecutor. To describe out-of-court statements by a prosecutor as being "intimately associated with the judicial process" strains language and logic beyond the breaking point.

In *Imbler*, this Court rightly focused on the important public policy question of whether the grant of absolute immunity would undermine an important purpose of 42 U.S.C. §1983 – the deterrence of unconstitutional conduct by government officials; *Imbler*, 424 U.S. at 429; *see also*, e.g., *Monroe v. Pape*, 365 U.S. 167 (1961); *Monell v. Department of Family Services*, 438 U.S. 678 (1978); *Owen v. City of Independence*, 445 U.S. 622 (1980). In *Imbler*, the Court

determined that sufficient deterrence was available for the acts at issue there in the correctives of the criminal process itself, professional discipline, and criminal prosecutions, particularly prosecutions under 18 U.S.C. §241 and 242. In the seventeen years since *Imbler* was decided, it has become all too obvious that these methods of deterrence are ineffectual in deterring prosecutorial misconduct, and give no support to an award of absolute immunity to these respondents.

Commentators who have studied prosecutorial misconduct and its deterrence have noted both how widespread it has become and how difficult it is to control. As early as 1972 Albert Alschuler commented that "the academic commentators have almost universally bemoaned its frequency." Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 Tex. L. Rev. 629, 631 (1972). This frequency has continued to the present, despite numerous cases where prosecutorial misconduct has resulted in the reversal of a defendant's conviction, and has led one recent commentator to refer to it as an "epidemic," and another to state that "flagrant prosecutorial misconduct appears to be increasing." Genson and Martin, *The Epidemic of Prosecutorial Courtroom Misconduct In Illinois: Is it Time to Start Prosecuting the Prosecutors?* 19 Loyola Univ. of Chi. L.J. 39 (1987); Steele, *Unethical Prosecutions and Inadequate Discipline*, 38 Sw. L.J. 965, 968, 979 (1984); *See also*, Gershman, *Prosecutorial Misconduct*, §1.8(d) (Clark Boardman, 1992). The continued frequency of prosecutorial misconduct from 1975 to the present underscores that the existing forms of deterrence are woefully ineffective.

While all too frequent reversals on appeal due to prosecutorial misconduct apparently do not deter prosecutors, deterrence by discipline and prosecution is



ineffectual because it is so infrequently imposed. Steele, in his study of prosecutorial misconduct cases, found that such misconduct "provokes little or no outrage among the legal profession and very rarely results in any disciplinary investigation or sanction." 38 Sw. L.J. at 979. This finding was reaffirmed in 1992 by Gershman who stated that effective discipline by bar associations is "so rare as to make its use virtually a nullity . . . . With the exception of a handful of cases . . . effective disciplinary action is an illusion."[7] Prosecutorial Misconduct §1.8(d).

Similarly, prosecution of prosecutors under 18 U.S.C. §241 and 242, is so rarely, if ever, attempted that petitioner has been unable to find a single reported case in which a prosecutor has been so charged. In Chicago, petitioner's counsel has been actively litigating official misconduct cases for the past 23 years, and knows of no such prosecution despite several egregious cases which invited such action.[8] Additionally prosecutions of public

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[7] Several reasons are advanced for this phenomenon, including the reluctance of defendants, defense lawyers, and judges to report prosecutors; underfunding, understaffing, and general ineffectiveness of the Bar disciplinary agencies; and the refusal to permit bar associations to discipline prosecutors. *See*: Steele, 38 Sw. L.J. at 967-8, 980-82; *Simpson v. Alabama*, 311 So. 2d 307 (Ala. 1975); *Snyders Case*, 301 Pa. 276 (1980).

[8] For example, in *Hampton v. Hanrahan*, 600 F.2d 600 (7th Cir. 1979), the prosecutor was charged with planning a raid in which two Black Panthers were murdered, then covering up these actions, by, *inter alia*, falsifying evidence and maliciously prosecuting the survivors of the raid. The federal prosecutors refused to seek a federal indictment under 18 U.S.C. §241 and 242, after a grand jury heard several months of evidence. In *Palmer v. Chicago*, 562 F. Supp. 1067, 1071 (N.D. Ill. 1983) rev'd on other grds., 755 F.2d 560 (7th Cir. 1985), prosecutors were aware of a longstanding police policy and practice of secreting excul-

officials under 18 U.S.C. §241 and 242 are both rare and seldom successful, a reality which has led former federal prosecutor and current Second Circuit Court of Appeals Judge Jon Newman to conclude that "criminal law is often an incomplete and inadequate instrument for adjusting the competing demands of law enforcement and the rights of citizens," because of the reasonable doubt standard of proof and "the inevitable reluctance of the ordinary citizen to brand a law enforcement officer as a criminal . . . even if they think he acted improperly." As a result, Judge Newman proposed in testimony to Congress a new civil rights damage remedy, free of immunity defenses, which would be prosecuted by the government. Newman, *How to Protect Other Rodney Kings,* N.Y. Times, Friday, May 1, 1992, at 35; N.Y. Times, May 8, 1992, at 30; Hous. Chron. May 6, 1992, at 7.

The public policy concerns of the *Imbler* court in allowing prosecutors to prosecute free from the burden of civil litigation do not support the grant of absolute immunity for the functions performed by respondent prosecutors here. On the other hand, the public policy of deterring unconstitutional conduct weighs heavily in favor of petitioner, and supports denial of absolute immunity.

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patory evidence in "street files" which were not produced to the defendant in criminal discovery; in *People v. Wilson,* 116 Ill. 2d 29 (1987), a prosecutor who was told by a police torture victim that he was being tortured did nothing to stop or report it, but rather took an inculpatory statement which was the product of that torture; and in *Jones v. City of Chicago,* 856 F.2d 985, 989-90, 992 (7th Cir. 1988), a prosecutor participated in a "common venture to railroad" the plaintiff and to cover up those actions. In none of these cases was there a federal criminal prosecution.



### C. Respondents' acts are functionally investigative and administrative, rather then prosecutorial, in nature

Under *Imbler* and *Burns,* respondents' acts, and the course of conduct they reflected, were functionally investigative and administrative, rather than prosecutorial, and were not "intimately associated with the judicial process." *Imbler,* 424 U.S. at 430; *Burns* 111 S. Ct. at 1942. The pre-indictment investigative acts were not only remote in time and place from the judicial process, but were also functions that are normally and primarily performed by police officials, particularly before an arrest has been made or an indictment obtained. Police investigators, rather than prosecutors, normally conduct the interrogations of suspects and witnesses, and work with a crime laboratory's forensic personnel to analyze, identify, and match physical evidence, whether it be blood, ballistics, fingerprints, or bootprints.

This Court's decision in *Burns* also clearly demonstrates that respondents' conduct and acts in interrogating suspects and witnesses, and in obtaining and/or manufacturing evidence, was investigative in nature. In *Burns,* the prosecutor was denied absolute immunity for giving advice to police officers concerning their interrogation of the plaintiff, and for the procurement and manufacture of evidence. In *Burns* the manufactured evidence was a hypnotized "confession," while in *Buckley* it is a bootprint "match." If giving advice concerning such acts is investigative, as this Court held in *Burns,* then participating in the acts themselves must also be investigative and not entitled to absolute immunity.[9]

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[9] For other cases which hold that a prosecutor's role in obtaining evidence is investigatory, see, *Mitchell v. Forsyth,* 472

It is again instructive in analyzing the nature of the respondent's function to consider the circumstance where the prosecutors who manufactured the evidence and conducted the coercive interrogations were different from those who presented the evidence obtained in court. In that analogous circumstance, it becomes even more obvious that the conduct of the first set of prosecutors is essentially investigative in nature, and that such conduct is entirely miscast as a normal or necessary part of a prosecutor's preparation for trial, as the court below has done.

Respondents' prejudicial and defamatory out of court public statements and publicity campaign are clearly administrative, rather than prosecutorial, acts. They are remote from, and unnecessary to, the judicial process, and practically every court which has considered the question has determined them to be non-prosecutorial in nature.[10]

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U.S. 511 (1985); *Barbera v. Smith*, 836 F.2d 96 (2d Cir. 1987), which held that the function of *acquiring* evidence jointly with law enforcement officials prior to arrest and prosecution, is an investigative function, which does not require absolute immunity; *Hampton v. Hanrahan*, 484 F.2d 601 (7th Cir. 1973); *Briggs v. Goodwin*, 569 F.2d 10, 23 (D.C. Cir. 1977), cert. den., 98 S. Ct. 3089 (1978); *Forsyth v. Kleindeinst*, 599 F.2d 1203, 1215 (3rd Cir. 1979); *Guerro v. Mulhearn*, 498 F.2d 1249 (1st Cir. 1974); *McSurely v. McClellan*, 697 F.2d 309 (D.C. Cir. 1982); and *Gobel v. Maricopa County*, 867 F.2d 1201 (9th Cir. 1989).

[10] *Stepanian v. Addis*, 699 F.2d 1046 (11th Cir. 1983); *Marx v. Gumbinner*, 855 F.2d 783 (11th Cir. 1988); *Powers v. Coe*, 728 F.2d 97, 103 (2d Cir. 1984) (Plaintiff alleged a publicity campaign by prosecutors to deprive plaintiff of his right to fair trial by disclosing secret evidence that had been presented to the grand jury; the Second Circuit, finding that a prosecutor's dealings with the press were administrative, held that there was no



Similarly, participating in petitioner's arrest and imprisonment by directing the arresting officers to arrest and imprison him despite the absence of probable cause, is an integral part of the police function for which police officers have repeatedly been afforded only qualified immunity. *Pierson v. Ray*, 386 U.S. 547 (1967); *Malley v. Briggs*, 475 U.S. 335. In *Imbler*, Justice White recognized in his concurring opinion that prosecutors were afforded only qualified immunity for false arrest, 424 U.S. at 441 n. 6, while in *Burns*, the prosecutor was not afforded absolute immunity for his similar, though less affirmative, participation in plaintiff's arrest. Moreover, respondents' decision to continue petitioner's arrest and imprisonment, again without probable cause, after the hung jury, Dugan's confession, and the FBI bootprint report, was a non-prosecutorial function which should be afforded only qualified immunity. In addition, the imprisonment itself continued to be caused by the manufactured false

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absolute immunity for a prosecutor's "extraneous statements to the press designed to gain unfair advantage at trial."); *Gobel v. Maricopa County*, 867 F.2d 1201 (9th Cir. 1989) ("A prosecutor's public statements regarding criminal proceedings are not protected by absolute immunity because they are not quasi-judicial acts."); *Helstoski v. Goldstein*, 552 F.2d 564, 566 (3rd Cir. 1977) (no absolute immunity for a prosecutor's deliberate leaks to the press in investigation leading to prosecution); *Taylor v. Kavanagh*, 640 F.2d 450 (2d Cir. 1981) (no absolute immunity for distributing extraneous statements to the press); *Walker v. Cahalan*, 542 F.2d 681 (6th Cir. 1976) (no absolute immunity for prosecutor's public statements after a criminal charge had been dismissed); *Marrero v. City of Hialeah*, 625 F.2d 499, 511 (5th Cir. 1980) (authorized public statements by a prosecutor, and the public interest in information concerning the affairs of government, are amply protected by qualified immunity); see also *Martin v. Merola*, 532 F.2d 193, 195-198 (2d Cir. 1975) (Lombard, J., concurring).

evidence. It was only because of this false evidence that the original arrest occurred, and the intervention of the first trial, and the hung jury, did nothing to break the causal relationship.

The acts alleged against respondents are thus investigative or administrative rather than prosecutorial. Because there was no immunity at common law for such acts, and because, even if there were, the policy concerns enunciated in *Imbler* do not support extension of absolute immunity, respondents have not met their burden of establishing that they are entitled to absolute immunity.

### D. The Court of Appeals' "place of injury" test for absolute immunity contradicts this Court's decisions that immunity is determined by the function performed.

This Court has made it clear that absolute immunity for a prosecutor is determined by the function he performs, not his status as prosecutor. *Imbler* at 430; *Burns* at 1939; *see also, Forrester v. White,* at 224. The court of appeals' decision, while paying lip service to this principle, abandons it in favor of a "place of injury" test, whereby no matter what function the prosecutor is performing when he commits wrongdoing, he will be immune if the injury occasioned by the act was not complete when the judicial process was initiated, or if the injury "flowed from" the judicial process. This test, which the court of appeals recommended as a "simple demarcation," (J.A. 87) is unsupported by history or the valid policy concerns enunciated in *Imbler* and *Burns,* is a radical extension of absolute prosecutorial immunity, and constitutes precisely the type of "freewheeling policy choice" that this court condemned in *Malley v. Briggs,* 475 U.S. at 342.



The court of appeals' opinion is entirely bereft of any historical authority for its novel proposition that the place of injury determines whether an act is sufficiently prosecutorial for absolute immunity to apply. Yet, since absolute immunity is a question of statutory construction, *see, Briscoe v. LaHue,* 460 U.S. 325, 326 (1982), the existence of such immunity at the time of enactment of §1983 is a necessary condition to delimit the statute's express language. It is respondents' burden to establish the existence in 1871 of immunity for acts causing injury in the judicial process, and they have failed to do so. In fact, the evidence is that the place of injury was never a relevant concern in determining the prosecutor's immunity. *See, Imbler v. Pachtman,* at 441 n. 6 (White, J., concurring in judgment). Rather than dating from 1871, the court of appeals' test appears to be of 1990 vintage.

Moreover, the majority's expansion of absolute prosecutorial immunity runs directly contrary to this Court's admonition that absolute immunity, which is in "undeniable tension" with "the ideal of the rule of law," *Forrester v. White,* at 223, must be imposed sparingly and only where it is justified by "overriding considerations of public policy." *Id.* at 224. *Imbler* and *Burns* stressed that this standard was met only when the civil litigation concerned conduct intimately associated with the judicial process, and *Burns* pointed out that absolute immunity was not justified "for every litigation-inducing conduct." *Burns,* at 1943.

The court of appeals' test leads to incongruous results. If a prosecutor helped create false evidence while he participated in an investigation, and then caused the target to be arrested without presenting that false evidence to a judge or grand jury, he could be liable for false

arrest.[11] But the prosecutor could immunize himself from civil liability by obtaining an arrest warrant or indictment based on the same false evidence, so that the arrest would "flow" from the judicial process. By compounding his wrongdoing and presenting knowingly perjured testimony to a judge or grand jury, the prosecutor could absolve himself of civil liability. The test thus not only wrongly immunizes investigative conduct, but also encourages perjury and subornation of perjury by prosecutors. This result is also in direct conflict with the holding of *Malley v. Briggs* that issuance of a warrant does not break the causal chain between application for the warrant and arrest. 475 U.S. at 344 n. 6.

The place of injury test also fails to satisfy the policy concerns enunciated in *Imbler* and *Burns*. Where a prosecutor's investigative or administrative acts cause injury in the judicial process, the focus of inquiry in civil litigation will be the wrongdoing itself rather than its effect. To the extent that causation of damages becomes an issue – e.g. the prosecutor claims that the false evidence was not a proximate cause of imprisonment since there was sufficient untainted evidence to justify the arrest and imprisonment of the criminal defendant – this question will focus on an objective appraisal of the available evidence and whether the untainted evidence was sufficient to amount to probable cause. This will not entail inquiry into the prosecutor's subjective motivation in presenting the evidence before a judicial proceeding, his trial strategy, or how he carried out his duties as prosecutor, since

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[11] This was the initial situation in *Burns*. Subsequently, however, the plaintiff apparently was released, then, after two separate probable cause determinations, rearrested, and held for four months. *Burns*, 111 S. Ct. at 1937; *Burns v. Reed*, 894 F.2d 949, 950-952 (7th Cir. 1989).



probable cause is an objective test. *Anderson v. Creighton*, 483 U.S. 635 (1987). Thus, litigation concerning whether wrongdoing outside the judicial process caused injury inside it will not interfere with the judicial process.

Moreover, the fact that injury has occurred within the judicial process has never been held sufficient to deny recovery. In *Tower v. Glover*, 467 U.S. 914 (1983), the court upheld the §1983 suit of a criminal defendant against his former public defender for damages caused by his conviction which allegedly resulted from a conspiracy between the defender, the prosecutor and judges. *Malley v. Briggs* upheld the possibility of recovery for an arrest which had occurred after a warrant had been issued, while in *Burns*, the most serious of plaintiff's injuries occurred after search *and* arrest warrants were issued.

Denying absolute immunity to a prosecutor whose investigative or administrative acts cause injury within the judicial process will not unduly hamper prosecutors in the discharge of their obligations. A prosecutor's most important task is the litigation of cases before judicial bodies. In carrying out that task he takes actions that are closely associated with the judicial process and which are, under *Imbler*, entitled to absolute immunity. When a prosecutor engages in other tasks such as investigation, public comment, or providing legal advice to government officials, he is doing things that need not be done by a prosecutor and which are not closely associated with the judicial process. Investigation is routinely assigned to police officers, public statements may be made by a spokesperson, and legal advice is often given by private attorneys retained by a municipality. On the other hand, the representation of the government's interest in prosecuting crime is usually done only by a prosecutor. For actions other than those intimately associated with the

judicial process, a prosecutor is entitled to qualified immunity which "provides ample support to all but the plainly incompetent or those who knowingly violate the law." *Burns*, at 1944, quoting *Malley* at 341. Although denial of absolute immunity may cause a prosecutor to think more carefully about the constitutionality of his actions, this is salutary since "[w]here an official could be expected to know that his conduct would violate statutory or constitutional rights he *should* be made to hesitate." *Burns*, at 1944, quoting *Mitchell v. Forsyth* at 524, and *Harlow*, at 819.

The injury test also presents substantial practical and interpretational problems which further complicate the question of absolute prosecutorial immunity. Several of these problems are presented in this case. For example, how is it determined if the injury "flows from" the judicial proceeding? Petitioner's arrest and imprisonment here can legitimately be considered to have happened outside the judicial process and to have been caused by – and therefore flow from – non-judicial factors, including the manufacture of evidence, coercive interrogations, the prosecutor's illicit political motivation, the false and defamatory press conference, the decision to arrest and imprison and/or the actual arrest and imprisonment – rather than by the grand jury indictment itself. The judicial process – and particularly the grand jury indictment – was less important to the arrest and imprisonment than was the out of court investigative conduct alleged above.[12]

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[12] Similarly, if the portion of Seventh Circuit's injury test which requires that the injury be complete before the judicial process begins were applied to *Burns*, several different results could be reached. Since Burns was initially arrested before there was a judicial determination of probable cause, the injury test could be applied in such a way as to conclude that the injury occurred before judicial intervention, and therefore the prosecutor's conduct should not be afforded absolute immunity. However, subsequently plaintiff was apparently rearrested, pursuant to a judicially issued arrest warrant, and suffered the most serious of her arrest and imprisonment injuries. Does the "injury test" require immunization of the entire arrest and imprisonment, should they be considered two separate injuries, divided by judicial intervention, one actionable and one not, or should the prosecutors be exposed to liability for the entire injury, because the original arrest and imprisonment took place before judicial intervention?



A related problem is posed by petitioner's publicity "injuries." Petitioner clearly alleges several components to this injury, some of which occur within the judicial process, while another happens outside. Specifically, petitioner alleges that the publicity defamed him – a component of his injury which has nothing to do with the judicial process. While this component by itself may not rise to a constitutional violation under the *Paul v. Davis*, 424 U.S. 693 (1976), "defamation plus" test, it does if it is viewed together with the injuries suffered within the judicial process. Even if components of the injuries are immunized by their locus, should they not be considered in determining the "defamation plus" test, much the same way that an immunized judge provides color of law to an otherwise private §1983 conspiracy by his immunized acts? *See, Dennis v. Sparks*, 449 U.S. 24 (1980). And if the injury is considered as a single injury, does the in court prejudice immunize the entire injury, does the defamation expose the prejudice to liability, or is the defamation actionable while the "plus" is not?

That the prosecutor's investigative or administrative acts may in some way be related to, or affect, either the decision to prosecute or the prosecution itself, and thus cause some injury within the judicial process, does not entitle it to absolute immunity. *Burns* at 1944; *Mitchell v. Forsyth*, at 521. If immunity were expanded that widely, almost any act by the prosecutor would be absolutely immune and the functional test of *Imbler* and *Burns* would be a dead letter. Prosecutors generally perform tasks that are related to a prosecution and which eventually cause results in the judicial process. That relationship in itself does not entitle the acts to absolute immunity, which is reserved only for acts intimately associated with the judicial process.

## 2. RESPONDENTS' MALICIOUS DECISION TO SEEK AN INDICTMENT AGAINST PETITIONER IS NOT ENTITLED TO ABSOLUTE IMMUNITY.

In his first point petitioner argued, *inter alia*, that respondents were not absolutely immune for investigative acts, including the manufacture of evidence, which caused his false arrest and imprisonment, and that the fact that this imprisonment occurred in the course of a judicial proceeding did not change this result. In this argument petitioner contends that he should additionally be permitted to recover against respondents for their malicious decision to indict, prosecute and reprosecute him.

### A. Prosecutorial immunity from all liability for malicious prosecution suits was not well established in 1871.

At common law, the well established rule was that a person who caused another to be indicted and prosecuted



was liable for malicious prosecution if there was no probable cause, the prosecutor acted maliciously, and the prior prosecution was determined in favor of the current plaintiff. *Dinsman v. Wilkes*, 12 How. 390, 402 (1852); *Randall v. Henry*, 5 Stew. & Pott. 367 (Ala. 1834). The cause of action was deliberately made difficult to maintain and win because of the public policy in favor of encouraging persons to prosecute offenders who would otherwise endanger the order and peace of the community. E. Scalia, *Police Witness Immunity*, at 1441-2; M. Newell, *Malicious Prosecution*, 21-22 (1892); F. Harper, *Malicious Prosecution*, 15 Tex. L. Rev. 157, 165-70 (1937); Blackstone, 3 Com. 126. If, however, the plaintiff could satisfy his heavy burden he would "ordinarily be handsomely rewarded . . . (for) the outrageous character of the defendant's conduct." F. Harper, *Malicious Prosecution*, at 170.

Most of the early malicious prosecution cases involve private parties, and make no mention of any distinction between the liability of a private, as opposed to a public, prosecutor. Private attorneys who prosecuted quasi-criminal actions on behalf of their clients, which led to the imprisonment of the defendant, were liable for malicious prosecution if they acted maliciously and without probable cause. *Burnap v. Marsh*, 13 Ill. 535 (1852). When the potential liability of a public prosecutor was discussed by a court, it was presumed that he was *not* entitled to absolute immunity and that the standard test – malicious indictment without probable cause – applied. *Parker v. Huntington and another*, 2 Gray 124 (Mass. 1854).

A nineteenth century treatise on malicious prosecution, M. Newell, *Malicious Prosecution* (1892), contains an extensive discussion of the immunity of judges, which makes it clear that they are immune even if they act

maliciously, *id.* at 125, but states that quasi-judicial officers are not entitled to such immunity and may be liable if they do not act honestly. Newell described the functions of a quasi-judicial officer as "those which lie midway between the judicial and ministerial ones . . . When the law . . . commits to any officer the duty of looking into the facts and acting upon them, not in a way which it specifically directs, but after a direction in its nature judicial, the function is termed quasi-judicial." *Id.* at 166. While a quasi-judicial officer could not be liable "for the honest exercise of his judgment, however erroneous or misguided that judgment may be," there was no provision for absolute immunity for such an officer who performed his duties dishonestly or maliciously. *Id.* at 166. The treatise provided that prosecutors were liable if there was malice and an absence of probable cause, with no distinction made between public and private prosecutors; the section on defendants contained no exemption for public prosecutors, *id.* at 367-68; and the defendant's status as a public prosecutor was not listed as a defense. *Id.* at 430-449. Thus, a major nineteenth century treatise on malicious prosecution indicated public prosecutors were not entitled to absolute immunity at common law.

The first case to hold that prosecutors were absolutely immune was *Griffith v. Slinkard*, 146 Ind. 117 (1896), a case decided well after the enactment of §1983. There, the Indiana court, relying on its earlier dicta in *State v. Henning*, 33 Ind. 189 (1870), which held, based on its interpretation of the Indiana constitution, that a prosecutor was a judicial officer for the purpose of an indictment for bribery,[13] granted a prosecutor absolute immunity on

[13] The holding was unnecessary to the decision in *Henning* since the court dismissed the case based on improper venue.



that basis. *Griffith* contained no discussion of any common law basis for such immunity, but rather based it on its interpretation of the Indiana Constitution.[14] *Griffith* thus provides no support whatsoever for the argument that absolute immunity for prosecutors was recognized at common law. Indeed, quite the opposite is true, since if there had been such a doctrine, the Indiana court would surely have cited it instead of, or in addition to, its argument based on the Indiana constitution.

In 1897 the courts of Kentucky indicated that a city attorney could be liable for a malicious prosecution. *Arnold v. Hubble*, 38 S.W. 1041, 18 Ky Law Rep. 947 (1897). Subsequently, the Supreme Court of Minnesota held that the chairman of a board of supervisors, whose official duties included the prosecution of persons violating statutes relating to obstruction of highways, was not absolutely immune from malicious prosecution when he prosecuted in his official capacity. *Skeffington v. Eylward*, 97 Minn. 244, 248 (1906). The reasoning of *Griffith v. Slinkard* was disapproved in *Leong Yau v. Carden*, 23 Haw. 362 (1916), where the court, citing *Newell, supra*, held that a prosecutor was a quasi-judicial, not judicial, officer, who was not liable for an honest mistake or error of judgment in instituting a criminal proceeding, but who was liable if he acted maliciously and without probable cause. *Id.* at 369. Subsequently, the New York Court of Appeals upheld a malicious prosection suit against a magistrate acting in the role of a prosecutor, though without discussing immunity. *Dean v. Kochendorfer*, 237 N.Y. 384 (1924). There are several later cases which do

[14] The current Indiana Constitution provides in its judicial article for the election of prosecuting attorneys. Ind. Const. Art. VII §16.

grant prosecutors absolute immunity for malicious prosecution, e.g. *Yaselli v. Goff*, 12 F.2d 396 (2d Cir.), aff'd, 275 U.S. 503 (1927); *Imbler v. Pachtman*, 424 U.S. at 421-4, but none cite any pre-1871 authority for their holdings.

Thus, the holding of *Imbler* that "the common-law rule of immunity (for prosecutors) is thus well settled" *id.* at 424, is not well grounded in history, and has recently been questioned by Justice Scalia's concurring and dissenting opinion in *Burns*.[15] This opinion identifies three relevant types of immunity recognized in 1871 – judicial, quasi-judicial and defamation – and notes that prosecutorial functions would have been considered quasi-judicial and entitled to qualified, not absolute, immunity. A prosecutor would not have been entitled to judicial immunity since he did not adjudicate rights, *id.* at 1949, but would be entitled to immunity from defamation suits for statements made in the course of court proceedings. *Id.* at 1947. However, a malicious decision to initiate a search warrant proceeding would have been actionable against a prosecutor as a form of malicious prosecution. *Id.* at 1949. The majority opinion in *Burns* did not disagree with this opinion's conclusions, but held that the issue had not been sufficiently raised by petitioner, and noted that it was not determining whether respondent's "motivation in seeking the search warrant or his conduct outside of the courtroom relating to the warrant" was entitled to absolute immunity. *Id.* at 1940.

The question is squarely presented here. Petitioner alleged respondents maliciously prosecuted him without probable cause, knowing that he was innocent, and for the purpose of deflecting blame away from them for the

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[15] This opinion was joined by Justice Blackmun and, in part, by Justice Marshall.



way they conducted their investigation, and to further respondent Fitzsimmons' political career.

### B. Public policy does not support absolute immunity for a prosecutor's malicious decision to prosecute based on an improper ulterior motive.

In accordance with the concurring and dissenting opinion in *Burns*, in light of the absence of common law malicious prosecution immunity for public prosecutors in 1871, and recognizing the revolution in qualified immunity protection that has occurred since *Imbler*, this Court should now limit *Imbler* to the thrust of the conduct challenged there – the presentation of evidence in court – and restore absolute immunity to the contours that were well established in 1871. In particular, the Court should hold that a public prosecutor's malicious decision to seek an indictment, in the absence of probable cause, but with the presence of an improper ulterior motive, is actionable, and the prosecutor is limited to qualified immunity. Such a holding would be in accord with accepted canons of statutory construction, would provide redress to plaintiffs who are seriously injured by defendants who are either plainly incompetent or knowingly violate the law, yet would maintain the common law's stiff barrier to recovery, and thus avoid a rash of unmeritorious lawsuits.

This standard would not violate the policy concerns underlying *Imbler*. Since the prosecutor and his witnesses retain absolute defamation immunity for anything said or filed before a judicial body, civil litigation would not adversely impact on the judicial process itself. The inquiry in such litigation would focus on the prosecutor's

decision to initiate proceedings rather than the proceedings themselves. Moreover, unmeritorious suits could be quickly dismissed based on a lack of adequate pleading of malice or lack of probable cause in the complaint itself, the inability of a plaintiff to counter a defendant's legal arguments and factual assertions in a motion for qualified immunity, or his specific assertions of good faith and probable cause in a motion for summary judgment. Thus, the prosecutor would be protected more fully than were prosecutors, private and public, at common law, even though the common law recognized the same policy concerns that exist today – the importance of not making it unduly burdensome to bring criminal prosecutions.

This standard, like the more relaxed standard at common law, would not lead to a rash of malicious prosecution suits against prosecutors. First, all criminal defendants who were convicted – the persons most likely to feel aggrieved and to have the time to spend on litigation – would be barred from recovery. Next, the plaintiff would have to show lack of probable cause, which in most cases would involve a specific factual challenge to the quality of evidence previously accepted as sufficient (at a probable cause hearing or before the grand jury), showing in what particulars that evidence was in fact insufficient to establish probable cause. In addition, the plaintiff would have to show a malicious intent on the part of the prosecutor, an intention to bring criminal charges for an ulterior purpose rather than bringing a miscreant to justice, as well as that the prosecutor's actions violated a clearly established Constitutional right. Unless a plaintiff could overcome a prosecutor's assertion that he had reached an honest conclusion based on the evidence presented to him, the suit would be subject to summary dismissal. That these standards would not lead



to substantial litigation is evidenced by the paucity of suits against complaining witnesses, who are liable for malicious prosecution, and who may not even have the protection of qualified immunity. *Malley v. Briggs*, at 340; E. Scalia, *Police Witness Immunity under §1983*, at 1441-2, 1443-59; *Wyatt v. Cole*, 112 S. Ct. 1827 (1992).

Moreover, the malicious decision to indict will not be subject to judicial oversight in the criminal proceeding. This decision occurs out of court and will generally not be a focus of any proceeding before the criminal court, since a prosecutor's malice is not a defense to a criminal charge.

While this standard would not lead to vexatious litigation which interfered with the judicial process, it would have the effect of deterring misconduct and compensating victims of blatantly unconstitutional conduct, both legitimate goals of suits for monetary damages. *Forrester v. White*, 484 U.S. 219, 223. Although *Imbler* suggested that deterrence of prosecutorial misconduct could be achieved through disciplinary action and criminal prosecution, the empirical evidence establishes that such sanctions are unlikely to be imposed and are ineffective. See, Part I above, at 27-29. Moreover, none of the suggested alternatives provide any compensation to the victim of a prosecutor's wilfully wrongful conduct, even though his injuries, like petitioner's, can be extremely severe. Providing for a civil remedy against a prosecutor for his malicious decision to bring criminal charges without probable cause establishes the possibility of recovery for this conduct if the plaintiff can meet the high burden imposed by the common law and qualified immunity, and thereby satisfies the other equally important purpose of §1983 – compensation to the victim. *See, Owen v. City of Independence*, 445 U.S. 622 (1980).

**C. Alternatively, this Court should adopt Justice White's position in *Imbler* and deny absolute immunity for respondents' decisions to prosecute and reprosecute petitioner because those decisions were accompanied by an independent allegation that respondents withheld evidence from the grand jury, the court, and petitioner.**

In his concurrence in *Imbler*, Justice White, joined by Justices Marshall and Brennan, expressly excepted from the ambit of absolute immunity the knowing prosecutorial suppression of evidence, because such suppression is not subject to correction by the judicial system, and denial of immunity in such circumstances would have the "very desirable effect of deterring such conduct." *Imbler*, 424 U.S. at 442-3. (White, J., concurring) More specifically, Justice White limited his concurrence to circumstances where the malicious decision to prosecute without probable cause was not accompanied by an "independent allegation that the prosecutor withheld exculpatory information from a grand jury or the court . . . " *Id.* at 438. Petitioner's case presents the exact exception articulated by Justice White – respondents withheld crucial favorable bootprint evidence from the grand jury, from the court, and from defense counsel, who eventually discovered the information independently on the eve of trial. In light of the historical, public policy, and qualified immunity arguments set forth in parts 1 and 2 above, petitioner urges this Court to adopt Justice White's position in *Imbler*, and apply it to deny absolute immunity to respondents' malicious decision to prosecute, and reprosecute, if it chooses not to adopt the broader rationale urged in parts 2 (a) and (b) above.



## CONCLUSION

In *Imbler v. Pachtman*, this Court first defined and applied absolute prosecutorial immunity. Sixteen years later, in *Burns v. Reed*, it further refined this definition, while excepting certain investigatory conduct from its ambit. In *Burns*, the Court recognized that its post-*Imbler* adoption of a greatly strengthened and objective qualified immunity standard further limited the need for absolute immunity. A thorough review of the common law and public policy further establishes that absolute prosecutorial immunity should not be extended to respondents' investigative and administrative acts and decisions. The "injury" test fashioned from whole cloth by the majority below does violence to the principles of immunity set forth above, is, as a practical matter, unworkable, and operates here to radically extend absolute immunity. Furthermore, in light of the above mentioned policy, common law, and qualified immunity considerations, a malicious decision to prosecute, particularly where there is an independent allegation of suppression of evidence, should also be excepted from the cloak of absolute immunity.

Therefore, for all the above stated reasons, petitioner urges this Court to reverse the court below, and hold that the following acts and decisions of respondents are investigative or administrative in nature and are therefore not entitled to absolute prosecutorial immunity:

1. supervising and participating in a year long pre-arrest and pre-indictment investigation which included the manufacture of evidence and the coercion of witnesses, and which led to petitioner's false arrest and imprisonment;

2. directing the arrest and imprisonment of petitioner;

3. holding a defamatory and prejudicial press conference, and conducting a prejudicial and defamatory publicity campaign;

4. deciding to continue petitioner's arrest and imprisonment after the jury hung and additional proof of innocence was produced;

5. the actual continuing of the arrest and imprisonment; and

6. the manufacturing of additional evidence after the first trial ended, in furtherance of petitioner's continued arrest and imprisonment.

Additionally, petitioner urges this Court to further hold that respondents' malicious decisions to prosecute and reprosecute him are also not entitled to the protection of absolute immunity.

Respectfully submitted,

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